State v. Rivera, 175 N.J. 612 (2003).

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

State of New Jersey v. Daniel D. Rivera (A-20-02)

(NOTE: This Court wrote no full opinion in this case. Rather, the Court's affirmance of the judgment of the Appellate Division is based substantially on the reasons expressed in the opinion below.)

Argued March 18, 2003 -- Decided April 8, 2003

PER CURIAM

The issue before the Court is whether a hearsay statement inculpating the defendant, Daniel Rivera, made by a co-defendant to police at the time of arrest, was properly received into evidence as an excited utterance under N.J.R.E. 803(c)(2).

On December 9, 1999, Detective James Mooney of the Atlantic City Police Department, assigned to the Narcotics Special Investigation Squad, phoned pager number 653-2529 and received a return call showing 441-0932 on his caller ID. Mooney cross-referenced the number to discover that the address was for a residence at 61 North Martin Luther King Boulevard in Atlantic City. The following day, December 10th, at about 7:00 p.m., Detective Mooney called the same number from a payphone. A Hispanic male named Dan returned the call. Mooney asked to purchase two bags of crack cocaine. Because Dan was not available, they agreed that Mooney would have to call back. Mooney made another call at approximately 8:23 p.m. to the same beeper and added "zero two," which was code for two bags of crack cocaine. Within three minutes, the same Hispanic man called back and it was decided that delivery would be in the parking lot of the Studio Six nightclub. About five minutes later, a sixteen-year-old Hispanic male identified as J.M. walked down the alleyway in the direction of the Studio Six parking lot. Two plainclothes detectives stopped J.M. as he reached the end of the alleyway. The juvenile, appearing shocked and nervous, threw two small bags of crack cocaine to the ground. Very excited and in a loud voice, he told the detectives that he was delivering crack for Danny Rivera and that Danny, who lived in Apartment 524B of the Schoolhouse Apartments, could tell them that the crack did not belong to J.M.

Approximately ten minutes after stopping J.M., Mooney and several other detectives proceeded to the Schoolhouse Apartments to arrest Rivera. En route to the fifth floor, they encountered Rivera on the stairs. When Rivera was asked to identify himself, Detective Mooney recognized his voice as the person he had spoken to earlier on the phone. Rivera acknowledged that the pager on his belt belonged to him. The

pager was removed and Detective Mooney pushed a button to reveal stored numbers. Among those numbers, were the payphone Mooney had called from and the code that he had used. Rivera was arrested and both he and his apartment were searched. No drugs were found.

Rivera was charged with possession of cocaine, possession of cocaine with intent to distribute, distribution of cocaine, employing a juvenile in drug distribution, conspiracy to distribute cocaine, and using a paging device while engaged in a drug offense. Rivera testified on his behalf, claiming that: he was in the apartment of his girlfriend babysitting his children; he borrowed J.M.'s pager to call another girlfriend and left coded messages that the police thought to be code for drugs; and when asked by the police, he had denied that the pager belonged to him and that he lived in Apartment 524B. Rivera maintained at trial that he was not involved in selling drugs that day and that the drugs found on J.M. were not his (Rivera's). Rivera had several witnesses corroborate his testimony.

A hearing was held to determine the admissibility of the inculpatory statement made by J.M. at the time of his arrest. The State argued that the statement was admissible under the excited utterance exception to the hearsay rule. The trial judge agreed, finding that the statement was admissible because it was made in an excited, panicked moment and that there was no opportunity to deliberate or fabricate. The court noted that the statement was not totally exculpatory; rather, it spread the blame for J.M.'s conduct.

Rivera was convicted on all counts and sentenced to an aggregate term of nine years imprisonment with a five-year parole disqualifier. Rivera appealed the conviction to the Appellate Division, challenging the admissibility of the inculpatory statement made by J.M. at the moment of his arrest.

The Appellate Division reversed Rivera's conviction and remanded the matter for a new trial. The court noted that admission of a hearsay statement implicates concerns reflected in the Sixth Amendment's Confrontation Clause, which is mirrored in our State Constitution. The Confrontation Clause bars the admission of certain evidence that would otherwise be admissible under an exception to the hearsay rule. The hearsay statement of an unavailable witness is admissible only if it bears an adequate "indicia of reliability." The court noted two distinguishing features to the statement made by J.M. and other admissible excited utterances. First, a participant in the criminal activity made the statement, although the declarant was not indicted because of his juvenile status. Second, the statement was made to police officers at the time of arrest. The vast majority of admissible excited utterances are made by victims or by third parties who witness the criminal event, either to third parties or occasionally to the police.

According to the Appellate Division, the statement made by J.M not only inculpated Rivera but tended to lessen J.M.'s culpability. The rationale of cases dealing with statements against penal interest, rather than excited utterances, applies equally to J.M.'s statement, given the circumstances under which it was uttered. J.M.'s statement

does not comport with the spirit of the disinterested witness that pervades the excited utterance rule. The admission of the statement, even if it otherwise qualified for admission under the excited utterance rule, violated the central concern of the Confrontation Clause, which is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. J.M.'s statement failed that test.

The Appellate Division concluded that statements inculpatory of a defendant made by a criminal accomplice to police while under arrest are so inherently suspect that they should not be admitted at a criminal trial. There is too much potential for abuse and it violates the Confrontation Clause, an essential component of a fair trial. Statements such as these do not carry with them "particularized guarantees of trustworthiness." Rather, the Appellate Division reasoned that these statements fall much closer to the types of post-arrest declarations consistently excluded under the Confrontation Clause than to those types of statements considered an excited utterance.

The Appellate Division further held that the error in admitting J.M.'s statement was not harmless. The statement was a core of the State's case. The remaining evidence linking Rivera to J.M.'s activities was circumstantial and Rivera provided answers to that evidence in his own testimony, which was somewhat corroborated by witnesses. The fact that the jury did not accept Rivera's factual accounting was likely influenced by J.M.'s statement to police.

HELD: The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Weissbard's opinion. The admission of a hearsay statement Rivera's alleged co-defendant made to police at the time of his arrest, in which he shifted the blame and implicated Rivera, violated the Confrontation Clause.

CHIEF JUSTICE PORITZ and JUSTICES COLEMAN, LONG, VERNIERO, LaVECCHIA and ZAZZALI join in this PER CURIAM opinion. JUSTICE ALBIN did not participate.

SUPREME COURT OF NEW JERSEY
A-20 September Term 2002

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DANIEL D. RIVERA,

Defendant-Respondent.

Argued March 18, 2003 – Decided April 8, 2003

On certification to the Superior Court, Appellate Division, whose opinion is reported at 351 N.J. Super. 93 (2002).

Hillary K. Horton, Deputy Attorney General, argued the cause for appellant (Peter C. Harvey, Acting Attorney General of New Jersey, attorney; Ms. Horton and James F. Smith, Assistant Atlantic County Prosecutor, on the briefs).

Bernadette N. DeCastro, Acting Deputy Public Defender II, argued the cause for respondent (Yvonne Smith Segars, Public Defender, attorney).

Mitchell E. Ignatoff argued the cause for amicus curiae, Association of Criminal Defense Lawyers of New Jersey.

PER CURIAM

The judgment is affirmed, substantially for the reasons expressed in Judge Weissbard's opinion of the Appellate Division, reported at 351 N.J. Super. 93 (2002).

CHIEF JUSTICE PORITZ and JUSTICES COLEMAN, LONG, VERNIERO, LaVECCHIA, and ZAZZALI join in this opinion. JUSTICE ALBIN did not participate.

SUPREME COURT OF NEW JERSEY

NO. A-20 SEPTEMBER TERM 2002

ON CERTIFICATION TO Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DANIEL D. RIVERA,

Defendant-Respondent.

DECIDED April 8, 2003

Chief Justice Poritz PRESIDING

OPINION BY Per Curiam

CONCURRING OPINION BY

DISSENTING OPINION BY

CHECKLIST	AFFIRM		
CHIEF JUSTICE PORITZ	X		
JUSTICE COLEMAN	X		
JUSTICE LONG	X		
JUSTICE VERNIERO	X		
JUSTICE LaVECCHIA	X		
JUSTICE ZAZZALI	X		
JUSTICE ALBIN	---------- -	--------- --	--------

TOTALS	6		